Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BETTY G. TRACY, PETITIONER
Appearing Pro Se

v.

BAPTIST HEALTHCARE SYSTEM, INC.,
doing business as WESTERN BAPTIST HOSPITAL, INC.,
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit
and The United States District Court,
Western District of Kentucky, Paducah Division

PETITION FOR WRIT CERTIORARI

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QUESTIONS PRESENTED

1. This case requires that "SEVERE" and "PERVASIVE" be defined in the Petitioner's claim of sexual harassment in that:

A) On numerous occasions, numerous female employees of the respondent were improperly touched in sexually overt ways, and physically offensive actions continued, despite the Respondent having knowledge of the harassment via various sources.

B) On numerous occasions, employees of the Respondent were subjected to sexually overt requests, as well as sexually offensive statements by the specific harasser of this case, and by Respondent's Management.

2. Is Respondeat superior liability established if the employer had full knowledge of the physical and verbal harassment, yet failed to correct the workplace environment, and can not prove their claim that prompt corrective action was taken, yet the offensive actions continued?

3. When concluded by Summary Judgment Standard within the Memorandum Opinion that all reasonable inferences are drawn in favor of the Petitioner, is oral argument with witness testimony warranted to prove that a genuine issue of material fact does indeed exist not only in the complained of sexual harassment, but also in that the Petitioner may prove her claims of a hostile work environment?

4. Petitioner, after properly notifying the Respondent of her engagement in a protected activity of the complaints herein, further reported the sexually

offensive conduct of a member of the Respondent's management. Thereafter, the Petitioner received a letter of employment termination in which this reporting was directly addressed and Petitioner was negatively viewed therein for having made this specific report.

A) Has an adverse employment action been exercised by the Respondent?
B) Does a connection exist between the Petitioner's engagement in a protected activity and an adverse employment action?

5. Is the Petitioner's complaint of a hostile and retalitory workplace environment one that a "reasonable person" would find as such, based upon, but not limited to the following facts?

A) The harasser mashed his acne and wiped it's contents on another person also employed within the workplace;
B) The Respondent's management personnel advised the Petitioner "not to honor (a) subpoena" in which the Petitioner was called testify against the harasser in an Honorable legal proceeding;
C) The Respondent's management personnel routinely questioned the Petitioner's coworker's concerning matters of the Petitioner, including her personal life;
D) The employment file of the Petitioner, as compiled by the Respondent, is in excess of eight hundred pages in which several management personnel of the Respondent clearly express intent of retaliation and disparagement to the Petitioner.

LIST OF PARTIES

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Respondent
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PETITION FOR WRIT OF CERTIORARI

Betty G. Tracy, the Petitioner, appearing Pro Se, hereby respectfully prays to The Supreme Court of the United States to issue in this matter Writ of Certiorari to review the memorandum opinion and order of the United States District Court, for the Western District of Kentucky, Paducah Division, entered October 18, 1999.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is located herein at Appendix 1, p.p. 1-A - 1-D Memorandum Opinion of the United States District Court for the Western District of Kentucky, Paducah Division is located at Appendix 2, p.p. 2 - 2I.

JURISDICTION

The United States District Court for the Western District of Kentucky, Paducah Division, granted the Petitioner's Motion For Summary Judgment in Memorandum Opinion, entered October 18, 1999. The United States Court of Appeals affirming the District Court's order, was filed September 26, 2000. The jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-3.

CONSTITUTIONAL PROVISION INVOLVED

In this matter, the Fourteenth Amendment clause of "Rights Guarantced Privileges and Immunities of Citizenship, Due Process and Equal Protection" applies.

STATEMENT OF THE CASE

BACKGROUND

Betty G. Tracy is a female Kentucky resident and natural born citizen of these United States. She has consistently maintained American citizenship throughout her life. As the divorced parent of two children, her employment earnings are the primary source of income for the household.

In 1995, Betty G. Tracy, Petitioner, was employed with a temporary employment agency and assigned to work within the medical records department of the Respondent, Baptist Healthcare Systems, Inc., d/b/a Western Baptist Hospital ("WBH"). Soon after beginning her work assignment at WBH, Tracy was offered employment by the Respondent, and accepted the offer. Within the first ten months of employment by the Respondent, Tracy rapidly received three promotional advancements, each of which included wage increases.

A company titled MedCopy was contracted by the Respondent to work within the medical records department, and in March, 1996, MedCopy employed Don Rathbun.

During his first week of employment within the medical records department, Rathbun, on repeated occasions, called for the attention of various department employees, then proceeded to mash acne sores on his face and wipe the contents on a department file clerk. Rathbun immediately began causing consistent disruptions and intimidation within the workplace, and with Respondent having knowledge of the conduct, Respondent allowed it to continue, without exercising any corrective action.

On April 5, 1996, Rathbun, on two occasions, intentionally ran his hands across a private area of the Petitioners body, enforcing the second incident by squeezing the Petitioner. On that same date, Rathbun also sat in the desk chair that the Petitioner was already occupying, and began a sexually repetitive wiggling motion against her. Petitioner immediately stopped doing her work assignment and left the immediate area. Rathbun later approached the Petitioner again and said "...Give me ten minutes. I'll make you melt. You'll be mine." Petitioner refused, to which Rathbun replied "Ten minutes is all it would take." Again, in order to stop Rathbun's unwelcome and offensive actions, the Petitioner had to stop working and leave her assigned work station.

The department's management staff was unavailable on that date, so the Petitioner reported Rathbun's actions to his own immediate supervisor, Mrs. Teresa Gurley.

Rathbun immediately became hostile toward the Petitioner for reporting the incidents to his management. He became uncooperative concerning the job assignments, and approached Tracy and said "You're denying yourself...". As Rathbun was making this statement, Tracy again had to leave the work area.

Rathbun and his immediate supervisor, Mrs. Gurley, then began a very public romance, and the two instigated an altercation at the workplace between two WBH employees, which required intervention by numerous department employees (including the Petitioner), as well as personnel from the security department of the Respondent.

When the Respondent's management investigated the altercation, Tracy and another female employee,

Dorothy McGee, each submitted written documentation to the Respondent of each having endured the repeated physical sexually offensive actions of Rathbun. The Respondent then failed to warn or reprimand Rathbun for either of the written complaints of his sexually offensive actions, as well as having held a primary role in the workplace altercation.

Therefore, in April, 1996, the Respondent undeniably held:

A) Two written complaints concerning that Rathbun had made repeated physical and verbal sexually offensive actions toward at least two department employees.

B) Knowledge of Rathbun's hostile demeanor and it's disruption within the workplace, as a result of the investigation into the altercation.

Respondent in this matter claims to have spoken with Gurley and warning her that Rathbun's actions would not be tolerated. However, the Respondent has repeatedly failed to produce any documentation that could be deemed as having taken any form of "prompt" or "proper" "corrective action", as is written policy of the Respondent. Respondent's sexual harassment policy is reprinted in the appendix hereto at p.p. 3A - 3B.

Petitioner holds that the Respondent's mere claim of having "warned Rathbun's supervisor that the conduct must stop" does not adhere to policy, and further, the Petitioner, after receiving knowledge of Rathbun's actions, allowed his promotion to management status .

Rathbun's actions of harassment and hostility were allowed to continue, with Respondent having knowledge of it's continuance. Tracy made three further complaints,

at later dates, to the Respondent's management concerning Rathbun's continuing conduct. With each of these complaints, the Petitioner was advised: "...just ignore him. He's just getting his kicks by keeping you upset.", and "...just get over it and get on with your life. I don't have time to discuss this with you."

Petitioner's post-documentation third complaint of the harasser's actions also included that Petitioner (and numerous coworkers) had received knowledge that they were being subpoenaed to testify in an emergency child custody hearing concerning that Rathbun had gone to the home that his supervisor/girlfriend was abandoning in order to cohabitate with him. At the Gurley address, Rathbun assaulted the husband of Teresa Gurley, and with this force, removed a three year old female child from the home and fled to Illinois. In the documentation of a meeting called at a later date, as well as in documentation to the Equal Employment Opportunity Commission ("EEOC"), the department's management admits to having advised the Petitioner "...not to honor the subpoena...", in which the testimonies of the Petitioner and her coworkers would have been unfavorable to Rathbun.

As the Respondent had knowledge of Rathbun's consistently sexually offensive conduct, and allowed it to continue, Rathbun, on numerous occasions, approached the workstation of the Petitioner to use her assigned telephone. During these occasions, Rathbun positioned his face very near the face of the Petitioner and breathed on her neck, as well as make long glaring stares at the Petitioner. With each of these occasions, as with the numerous events of April 5, 1996, Tracy had to stop her work assignments and leave that area of the department in order to bring a cease to the continuing occurrences of sexual harassment.

With the Respondent having knowledge of Rathbun's hostile demeanor causing severe distraction within the workplace, as well as allowing it to continue, on one occasion Rathbun boasted loudly that his "uncle" was, at that time, was receiving national media attention for murdering a woman. Rathbun was referring to a 1996 situation of a California photographer, Charles Rathbun, having murdered a California model by the name of Linda Sobek. In boasting to various members of the department staff that Charles Rathbun was his "uncle", Don Rathbun threatened the Petitioner by sternly warning "Don't make me or my family mad."

Because the department's management personnel continually refused to exercise any means of correcting the workplace of Rathbun's offensive actions, the Petitioner contacted the management personnel of the Respondent's Human Resources department. Afterwards, Tracy was called into the office of the medical records department supervisor and instructed by the Respondent that "We want you to shut up about Don, and quit causing trouble. We don't need a troublemaker in this department.".

Further, before taking any action toward correcting the workplace of Rathbun's disruptive actions, and despite numerous complaints of such from various other department employees, the Respondent's management advised the Petitioner that "Maybe none of this really happened. Maybe it's just all in (your) head." Tracy then advised the Respondent's management that she would no longer tolerate being sexually harassed by Rathbun, nor would she allow his hostile and intimidating actions to continue causing routine disruption concerning her job productivity. It was only after Tracy disclosed to the department management that she was considering seeking legal advise of the workplace matter before the Respondent

did, eventually, take any corrective action, by means of instructing Rathbun's supervisor that his employment within the department was terminated. However, with prior permission of the Respondent's management, Rathbun was allowed to routinely loiter the premises as he waited for his girlfriend while she conducted her business matters at the sight.

The allowed routine loiterings of Rathbun consisted of his driving wrecklessly at high rates of speed in circling the enitirety of a parking lot of the WBH facility, and making an obscene hand gesture to the Petitioner. On the later occasion, the Petitioner told management of Rathbun having made an obscene gesture, and management documented within the Petitioner's employment file that the Petitioner had "instigated" Rathbun making the gesture. However, the Petitioner had made no contact with Rathbun, and recieved the obscene gesture only because Petitioner passed Rathbun at a considerable distance. There are numerous witnesses to Rathbun's dangerous and offensive actions on the occasions that he was allowed by the Respondent to loiter the premises.

PETITIONER'S CLAIM OF EMPLOYER RETALIATION

Before being sexually harassed by Rathbun, the Petitioner was promoted within the department. Petitioner was training for this new position during the tenure of Rathbun. After the respondent did eventually take any means of corrective action toward Rathbun, Tracy received a job performance evaluation. This evaluation resulted in the Respondent denying Tracy a wage increase and being placed on a ninety day probationary period. Tracy was advised that the denial of a wage increase, as well as being placed on probationary status was because "Betty (Tracy) has personal problems and is therefore denied a raise and

placed on probation.", as was the Respondent's written comment of the evaluation. Respondent has since explained that denying a pay increase to the Petitioner, as well as placing her on a ninety day probation is because Tracy had "not learned the duties of her job description." Yet the Respondent has thus far has failed to address:

A) That Rathbun's actions caused continual interference; and,

B) That for approximately one and one half years the Respondent's management refused to provide necessary training to the Petitioner concerning the area within her job description of "Combining Duplicate Patient Records". Tracy requested this necessary training on numerous occasions, and was only granted such after requesting to the Human Resources department that she receive the necessary training. Further, this area of Tracy's job description was of vital importance, in that it directly concerned patient care.

The department's management became openly hostile and rude to Tracy on a daily basis. In an effort to resolve the still hostile work environment, Tracy contacted the Human Resources department and requested that she be given consideration for a transfer to another department. The Director of Human Resources advised Tracy that she would be welcomed to apply for any posted openings, but that the Respondent would not make any special concessions in this matter.

The Respondent routinely approached coworkers to question them concerning anything that could cause disparage to Tracy. Numerous times on these occasions the Respondent expressed not only their intent to retaliate against Tracy for having complained of Rathbun's actions, but also, as witness testimony shall prove, the

Respondent informed numerous employees of the department that they were "seeking Betty's resignation". Management's calling the department employees into the hallway to discuss matters concerning Tracy were seen and overheard by employees from other departments.

On three occasions the Respondent erroneously claimed that Petitioner was in violation of various policies and issued erroneous reprimandations to her. Tracy challenged each of these occasions, which were not only time consuming and extremely upsetting, but also caused great interference with her job performance, resulting in slowed productivity and difficulty in concentrating on the work assignments. Furthermore, on these occasions Tracy had not committed any violations of workplace policies, and other employees within the department had also taken the same actions that Tracy was reprimanded for, yet Tracy was the only one to ever be subjected to reprimandation.

Tracy was required to obtain counseling after challenging one of these erroneous reprimandations. She was told that if she did not attend counseling through the Employment Assistance Program (EAP) that the consequences would be "detrimental to (her) employment" and further instructed by the Human Resources Department that this required counseling would have to be obtained on her personal time.

Tracy further claims that Baptist Heathcare System, Inc. does not adequately train it's management personnel concerning it's policy of sexual harassment due to that, a gardener constructed a large poster board sign which read "Betty's Bloomer's are Planted Here. Please keep your butts out of here. Thanks." Betty G. Tracy found this to be genuinely offensive. Witness testimony shall serve as proof that this sign was placed in a flowerbed of WBH for

a minimum time frame of six hours. When Tracy discovered the sign, in embarrassment and humiliation, she personally removed it. The Respondent claims that this sign is in reference to a gardener planting a flower called "Blooming Betties", however, no such plant exists.

In June of 1996, Tracy filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), and was issued a letter of "Notice Of Right To Sue" on October 29, 1997. Due to the continuing retaliation by her superiors, through counsel, a complaint was filed in U.S. District Court, Western District of Kentucky, at Paducah.

After the Respondent received proper notice of the Petitioner filing complaint with the District Court, the Respondent's retaliation was not only continual, but also included two suspensions, and ultimately, termination of the Petitioner's employment based upon pretextual reasons, resulting in tragic economical and emotional damages to the Petitioner. The Petitioner instructed Tracy that she was not allowed to follow the Respondent's employment grievance policy. These instructions are reprinted in the appendix herein, at p. 4-A, and p.4-C.

Further, the Petitioner had reported to the Respondent that an upper level member of their management was routinely making offensive sexual comments about patients who were utilizing the services of the Respondent, and that, specifically, Petitioner reported that it's management, in the presence of those employed within the area, and by using offensive slang language, questioned a physician concerning the smell of a patient's vagina. The Respondent expressed their dismay to the Petitioner for reporting this matter in their letter of termination to her, which is reprinted at the appendix herein, at p.p. 4-B - 4-C.

Further, the Respondent's retaliation regarding complaints of Rathbun's actions also include that:

A) The file clerk on which Rathbun wiped the contents of his acne sores was terminated of her employment by the Respondent.

B) Dorothy McGee, an African-American, who also submitted written documentation of having repeatedly endured unwanted physical actions of Rathbun, and after the termination of the Petitioner, was addressed in a department meeting in which Respondent's management likened herself to the Ku Klux Klan, and stated "If the Ku Klux Klan doesn't want you living in their neighborhood, they burn your house. And if I don't want you working here, you're fired."

In May, 1999, Petitioner, with counsel, met with a representative of the Respondent and their legal counsel for a settlement conference in this matter. The Respondent offered an out of court settlement of three thousand dollars, "...because this has been such a time consuming matter...". Petitioner declined this offer, and was informed by the Respondent's legal counsel that they would file a motion for summary judgment. At that point, the Petitioner's counsel did not wish to continue in this matter and urged the Petitioner to settle. Petitioner declined to settle without any proper remedies, and her counsel then withdrew from the case. Petitioner then began proceeding in a pro-se capacity.

REASONS FOR GRANTING THE WRIT

On July 30, 1999 the Respondent's legal counsel filed a memorandum in support of motion for summary judgment to the District Court, for which the Petitioner

filed a timely response. The District Court, in Memorandum Opinion, found in favor of the Defendant, and Petitioner filed an Appeal to the Sixth Circuit based upon the following, as contained within the Memorandum Opinion:

> "The court construes the evidence and draws all reasonable inferences in the light most favorable to the nonmoving party." (Appendix p. 2-C)

The Petitioner respectfully prays to The United States Supreme Court in this matter to hold with it's decision of Procedure in the related matter of age discrimination, as decided in Reeves v. Sanderson Plumbing Products, Inc., (U.S., No. 99-356, 06/12/00.) having decided:

> "...in deciding Rule 50 motion for judgment as matter of law, court should, as in deciding motion for summary judgment, review all evidence in record, draw all reasonable inferences in favor of nonmoving party, and disregard all evidence favorable to moving party that jury is not required to believe."

The District Court erred in deciding within it's memorandum opinion the following:

1. "That the same day, the director of the medical records department , Meri Curtis, contacted Rathbun's supervisor, Teresa Gurley and told her that Rathbun's actions would not be tolerated and if there were further complaints, Rathbun would be banned from the hospital." (Appendix p. 2-B)

   A) This was decided against the Plaintiff based upon the Defendant merely claiming to have

warned the supervisor, yet the Defendant has consistently failed to offer any documented form of this erroneous corrective action.

B) Petitioner further challenges the District Court's judgment, in that had the Defendant actually contacted the harasser's supervisor to merely warn her that her employee's offensive actions "would not be tolerated", the written policy of the employer concerning sexual harassment does not make concessions for the supervisor of an offensive employee be the sole recipient of any corrective action taken by the employer. (App. 3)

C) Despite the Defendant's claim of warning that the harasser's actions "would not be tolerated", the offensive actions did continue after the employer had received knowledge of it's existence, and was allowed to continue despite further complaints.

D) The Defendant failed to adhere to their own policy and procedures, as sat forth and reprinted in the Appendix herein, p.p. 3A - 3B, in that none of the complaints were promptly investigated, and no corrective action was taken. And in violation of Procedure 4, employees that did complain of the sexual harassment were subjected to retaliation and intimidation.

E) The harasser was never banned from the premises, as the Defendant claims to have issued in warning to his supervisor. In fact, with permission, on numerous occasions, the harasser was allowed, to wander the premises aimlessly, and on these occasions, continuing

with the hostile, threatening, and intimidating conduct.

2. "In regards to the harassment, Rathbun's actions were not frequent or so severe as to reasonably interfere with the Plaintiff's work performance. His inappropriate touchings and remarks were made on the same day."

Petitioner argues this decision of the District Court, in that:

A) Rathbun sexually harassed the Petitioner, as well as others at the workplace, with these numerous occasions occurring on various dates.

B) On numerous occasions the Petitioner had to leave her workstation in order to cease the offensive actions in which she was being subjected to by Rathbun, therefore, unable perform her assigned duties.

C) The retalitory Defendant refused to give necessary training to the Petitioner in performing a crucial area of her job description.

D) The Defendant required that the Petitioner receive counseling based upon her complaints of continual sexual harassment and employer retaliation. Likewise, the employer then denied the Petitioner a pay increase and placed her on a ninety day probation, citing that the Petitioner had "personal problems".

The petitioner appealed to the United States Court of Appeals for the Sixth Circuit, requesting oral argument with witness testimony be granted based upon the District Court's finding of all reasonable inferences being found in favor of the Plaintiff. The Sixth Circuit denied Plaintiff's request for oral argument, and in citing EEOC v. Northwest Airlines, Inc., 188 F.3d at 701 (6th Cir. 1999), and Smith v. Ameritech, 129 F.3d 857, 863 (6th Cir. 1997), erred in concluding "that there is no genuine issue as to any material fact..."(Appendix 1B).

Petitioner challenges that there does indeed exist a genuine issue as to material fact, in that:

1. Petitioner has submitted numerous items of documentation as contained within her employment file, which is in excess of eight hundred pages, with the majority of that consisting of the employer having submitted intent to retaliate and treat the Petitioner with disparagement.

2. Witness testimony is vital in proving not only the frequency and severity of Rathbun's sexually offensive actions, but also that the employer 's retaliation and discrimination was intentional, as management clearly expressed intent of such in speaking with coworkers of the Petitioner.

Petitioner hereby prays to The Supreme Court of the United States that the decision of the District Court, as well as that of the Sixth Circuit, be remanded and oral argument with witness testimony be granted, as warranted in that all reasonable inferences have been found in favor of the Petitioner, and with witness testimony, the lower court decisions shall be properly reversed.

The Petitioner was terminated based purely upon retalitory and discriminatory reasons of the Defendant, specifically for having reported the sexually offensive actions of a member of the Defendant's management, and thereafter denied access to the employer's grievance procedure, as is policy. (Appendix 4A - 4C).

CONCLUSION

This Petitioner seeks to have this matter remanded, with oral argument and witness testimony.

Based upon the foregoing facts of this matter contained herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 99-6554

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTY G. TRACY, Plaintiff-Appellant

v.

BAPTIST HEALTHCARE SYSTEM, INC.
d/b/a Western Baptist Hospital, Inc.,
Defendant-Appellee

ORDER

FILED, SEPTEMBER 26, 2000
LEONARD GREEN, CLERK

Not recommended for full text publication. Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice must be prominently displayed if this decision is reproduced.

Before: MERRITT, KENNEDY and GILMAN, Circuit Judges

Betty G. Tracy, a Kentucky resident proceeding pro se, appeals a district court order granting summary judgment in favor of the defendant in her employment discrimination action pursuant to title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 and 2000e-3. This case has been referred to a panel of the court pursuant to Rule 34 (j) (l), Rules of the

Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P.34 (a).

On January 27, 1998, Tracy, through counsel, filed a complaint against Baptist Healthcare System, Incorporated, doing business as Western Baptist Hospital ("WBH"). Tracy alleged that she was employed by WBH in the medical records department. During Tracy's employment, WBH contracted with MedCopy, an independent company, to provide services within the medical records department. Tracy alleged that she was subjected to hostile work environment sexual harassment by Don Rathbun, an employee of MedCopy. Tracy also alleged that after she informed WBH of Rathbun's conduct, she suffered retaliation by WBH. Tracy's complaint was timely filed in the district court after the Equal Employment Opportunity Commission issued her a right-to-sue letter. Tracy sought declaratory and monetary relief.

WBH filed a motion for summary judgement. After Tracy's counsel withdrew from the case, Tracy responded to WBH's motion, and proceeded throughout the remainder of the case in a pro se capacity. On October 18, 1999, the district court granted WBH's motion for summary judgement and dismissed Tracy's claims. Tracy has filed a timely appeal. She requests oral argument in her reply brief.

We review the district court's grant of summary judgment de novo. See EEOC v. Northwest Airlines, Inc., 188 F.3d 695, 701 (6th Cir. 1999); Smith v. Ameritech, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when the evidence presented shows "'that there is no genuine issue to material fact and that the moving party is entitled to a judgment as a matter of law."' Northwest Airlines, 188 F.3d at 701 (quoting Fed. R. Civ. P. 56 (c)).

Upon review, we conclude that the district court properly granted summary judgment in favor WBH with respect to Tracy's sexual harassment claim. See Northwest Airlines, 188 F.3d at 701. To state a claim for hostile work

environment created by a coworker's sexual harassment, the plaintiff must assert and prove that : "(1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based upon sex; (4) the harassment unreasonably interfered with the plaintiff's work performance or created a hostile or offensive work environment that was severe and pervasive; and (5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action." Fenton v. HiSan, Inc., 174F.3d 868, 872 (6th Cir. 1999); see also Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 872 (6th Cir. 1997).

Although Rathbun's conduct was offensive, Tracy failed to demonstrate the existence of a genuine issue of material fact as to whether Rathbun's alleged actions were sufficiently severe or pervasive as to create an objectively hostile work environment. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993); Burnett v. Tyco Corp., 203 F.3d 980, 984-85 (6th Cir. 2000). The determination of whether the challenged conduct was "sufficiently severe" depends on it's frequency, whether it posed a physical or humiliatory threat, and whether it reasonably interfered with the plaintiff's work performance. Harris, 510 U.S. at 23. These are the elements that Tracy failed to show. Furthermore, when Tracy notified WBH of Rathbun's objectionable conduct, WBH took immediate and appropriate corrective action. See Fenton, 174 F.3d at 831.

We further conclude that the district court properly granted summary judgment in favor of WBH with respect to Tracy's retaliation claim. See Northwest Airlines, 188 F.3d at 701. In order to establish a prima facie case of retaliation, the plaintiff must show the following factors: 1) she engaged in a protected activity; 2) her employer knew of the protected activity; 3) she was subjected to an "adverse employment action;" and 4) a casual connection exists "between the

protected activity and the adverse employment action." Hafford v. Seidner, 183 F.3d 506,515 (6th Cir. 1999); see also Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987). Once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to produce "some legitimate, nondiscriminatory reason" for the adverse employment action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)); see also Wrenn, 808 F.2d at 501. If the defendant is able to proffer a nondiscriminatory reason for the adverse action, the burden shifts back to the plaintiff to produce credible evidence that the reason offered by the defendant is a mere pretext for unlawful retaliation. See Burdine, 450 U.S. at 253; McDonnell Douglas, 411 U.S. at 804; Wrenn, 808 F.2d at 501.

Tracy failed to establish a prima facie case of retaliation, as none of the alleged acts of retaliation involved an adverse employment action. The only actions that could possibly be construed as adverse are the denial of a transfer and initial post-probation pay increase. However, even if Tracy could establish a prima facie case of retaliation, WBH had legitimate, nondiscriminatory reasons for denying her request for a transfer and initial post-probation pay increase and Tracy has not provided evidence from which a reasonable jury could conclude that WBH's proffered reasons were a pretext for discrimination. See Burdine, 450 U.S. at 253; McDonnell Douglas, 411 U.S. at 804.

Accordingly, the request for oral argument is denied and the district court's order is affirmed. Rule 34 (j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

"s/Leonard Green"

Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

BETTY G. TRACY
v.
BAPTIST HEALTHCARE SYSTEM, INC.

CASE NUMBER: 5:98CV-29-J

ORDER

ENTERED: OCTOBER 18, 1999

For the reasons stated in the accompanying memorandum opinion, and the Court being otherwise sufficiently advised in the premises, IT IS ORDERED:

1). Defendant's Motion for Summary Judgment (dkt.#34) is granted. Plaintiff's claims are dismissed.

2). Defendant's Motion to Continue (dkt.#40) is denied as moot.

3). The Clerk of Court is directed to remove this action from the Court's docket.

4). Leave to appeal in forma pauperis is denied as such appeal would not be taken in good faith. See 28 U.S.C. x 1915(a)(3).

5). This is a final and appealable order and there is no just cause for delay.

This the 18th day of October 1999.

Entered Oct. 18 1999 Jeffrey Apperson, Clerk
by "s/deputy clerk" (seal)
"s/Edward H. Johnstone," Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

BETTY G. TRACY
V.
BAPTIST HEALTHCARE SYSTEM, INC.

CASE NO.: 5:98CV-29-J

MEMORANDUM OPINION

This matter is before the Court on Defendant's Motion for Summary Judgment (dkt.#34). Both a response and a reply have been filed. For the reasons that follow, the motion is granted. Plaintiff's claims are dismissed.

BACKGROUND

Plaintiff began working for Western Baptist Hospital in the medical records department in 1995. Located within the medical records department is a company called MedCopy which distributes copies of patients' records. Plaintiff states that on April 5, 1996, Don Rathbun, an employee of MedCopy touched her "several times on her bottom." (see complaint, dkt.#1). Plaintiff states that also on that date, Don Rathbun "sat down beside her in the same chair with her and began to rub against her." (see id.) Plaintiff states that later that same day, Don Rathbun remarked to her that "(i)n just ten minutes I could make you melt. You would be mine...Ten minutes is all it would take." (see id p.3). Plaintiff reported the incident to Rathbun's supervisor that evening

by telephone but she did not report the incident to her own supervisor. On April 23, 1996, Plaintiff reported Rathbun's actions to her own supervisor in writing. That same day, the director of the medical records department, Meri Curtis contacted Rathbun's supervisor, Teresa Gurley and told her that Rathbun's actions would not be tolerated and that if there were further complaints, Rathbun would be banned from the hospital. On May 30, 1996, the following month, Plaintiff states that she met with Meri Curtis and was told that "We want you to shut up about Don. You're causing trouble and we don't need a troublemaker in this office." (see dkt.#1 P.3). Plaintiff then met with Richard Thomas, the executive director of human resources, as she wanted to know why "nothing had been done" regarding Rathbun's actions. Plaintiff informed Thomas that Rathbun had not touched her again or made any other comments towards her but that he had used her phone and had "breathed on her." Later that day, Rathbun was banned from the hospital.

Plaintiff states that the following month, June 11, 1996, she was outside the hospital in the smoking area where she saw a sign which stated "Betty's bloomers planted here. Keep your butts out of here. Thanks." See id. p.4). In addition, on June 19, 1996, Plaintiff states that her supervisor and the department director met with her to inform her that she had not been authorized to leave for lunch and that in order to "avoid being written up" she should give them "a copy of the tape (Plaintiff had) made of their conversation." (see id. p.5). Plaintiff also alleges that she was denied a transfer to another

department following her complaints and that she was denied a pay increase. (see id.) Based on these events, Plaintiff filed this action pursuant to Title VII of the Civil Rights Act alleging claims of sexual harassment based upon a hostile work environment and retaliation. Defendant's filed a motion for summary judgment arguing that the Plaintiff cannot prove a Prima Facie case of sexual harassment because she cannot show that the conduct was severe and pervasive and because she cannot establish respondeat superior liability.

Summary Judgment Standard

A motion for summary judgment is only granted when "...there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). The burden of showing that there are no genuine issues of material fact is on the moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court construes the evidence and draws all reasonable inferences in the light most favorable to the non-moving party. See White v. Turfway Park Racing Ass'n., Inc., 909 F.2d 941, 943-44 (6th Cir. 1990). However, when defending against a summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e). It is not enough that the nonmoving party simply set forth "conclusory allegations." See Cincinnati Bell Tel. Co. v. Allnet Communication Servs., Inc., 17 F.3d 921,

923 (6th Cir.1994). When reviewing the motion for summary judgment, the court "determine(s) whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Patton v. Bearden, 8 F.3d 343, 346 (6th Cir. 1993) (citations omitted).

Plaintiff's Claim of Hostile Work Environment

In order to state a prima facie claim of sexual harassment claim based on hostile work environment, a plaintiff must show that "(1) she is a member of a protected class; (2) she was subject to unwelcomed sexual harassment; (3) the harassment unreasonably interfered with her work performance and created a hostile work environment; and (5) (that her employer) 'knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action.'" Blankenship v. Parke Care Centers, Inc., 123 F.3d 868, 872 (6th Cir.1997) (citations omitted). The complained of behavior must be so severe and pervasive that it alters the condition of employment and creates an abusive working environment. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). The Supreme Court has stated that the working environment has to be "both objectively and subjectly offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, -U.S.-, 118 S. Ct. 2275, 2283 (1998) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993)). In determining whether the environment was "sufficiently

hostile or abusive," the Supreme Court directed lower courts to '"look () at all the circumstances,' including the 'frequency of the discriminatory conduct; it's severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."' Faragher, 118 S.Ct. at 2283 (quoting Harris, 510 U.S. at 23). The Supreme Court specifically noted that "(a) recurring point in (it's) opinions is that 'simple teasing' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment."...We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment." Faragher, 118 S.Ct. at 2283 (internal citations omitted).

The essential elements of a prima facie showing in this case are that Plaintiff must show that "the harassment unreasonably interfered with her work performance and created a hostile work environment; and (that her employer) 'knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." In regards to the harassment, Rathbun's actions were not frequent or so severe as to unreasonably interfere with Plaintiff's work performance. His inappropriate touchings and remarks were made on the same day. Plaintiff waited two and one half weeks before reporting them to her supervisors. Once reported, the defendant states that Rathbun's supervisor was contacted that same day and

told that Rathbun's actions would not be tolerated and any further complaints would result in his being banned from hospital premises. Plaintiff has not offered any evidence which would dispute that Rathbun's supervisor was contacted on the day of her written complaint. Thereafter, between that date, April 23, 1996 and May,31, 1996 there were three to five instances where Rathbun "breathed on her," "used her phone" or "reached over her." Once she reported these actions on May 31, 1996, Rathbun was banned from the premises.

The Sixth Circuit has stated that a plaintiff claiming a hostile work environment must show that "the harassment made it more difficult to do (her) job." Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1998). Plaintiff has not created a genuine issue of fact that Rathbun's actions created an objectively intimidating, hostile work , nor has she demonstrated that the Defendant failed to implement prompt and appropriate corrective action once she reported the various instances. For these reasons, her claim of sexual harassment based on a hostile work environment is dismissed.

Plaintiff's Claim of Retaliation

Plaintiff also alleges that Western Baptist Hospital retaliated against her for filing the harassment complaint. In order for Plaintiff to state a claim of retaliation, the Sixth Circuit has held that she must show that 1) she engaged in activity protected by Title VII; 2) that the defendant knew of the exercise of her civil rights; 3) that she thereafter suffered an adverse employment action; and 4) that there was a

casual connection between the activity and the adverse employment action. See Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir.1987). If a plaintiff succeeds in making the prima facie showing, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. See id. at 501. Once the employer proffers a legitimate, non-discriminatory reason, the burden then shifts back to the plaintiff for her to show that the proffered reason was pretextual. See id. In order to establish pretext, a plaintiff must show that the proffered reason is both false and discriminatory. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993). "Mere personal beliefs, conjecture and speculation are insufficient to support an inference of...discrimination." Chappell v. GTE Products Corp., 803 F.2d 261, 268 (6th Cir. 1986), cert. denied, 480 U.S. 919 (1987).

Plaintiff essentially bases her retaliation on these events: 1) a sign being placed in the flower bed by the smoking area which read "Betty's Bloomers planted here - please keep your butts out ;" 2) a security guard threatening to tow her car; 3) her supervisor informing her that leaving a voice mail stating that she was going to lunch was not acceptable; 4) her being denied a transfer to another department; and 5) her being denied a pay increase.

The record reveals that the gardener had placed the sign in the flower bed because he had planted a type of flower called "Blooming Betties" there and wanted to keep smokers from throwing their cigarette butts into the flower bed. The record also reveals that the security

guard threatened to tow Plaintiff's car from the pediatric group parking lot only after security received a complaint from a pediatric employee that Plaintiff's car was illegally parked in one of their spaces. As for Plaintiff's supervisor informing her that her leaving a voice mail message stating that she was going to lunch was not acceptable, Defendant states that hospital policy requires employees to receive permission before they leave the premises.

Given that Plaintiff engaged in protected activity by filing the harassment complaint and given that the Defendant knew of the exercise of her civil rights, Plaintiff has not shown that she suffered an adverse employment action related to her filing the harassment complaint. Plaintiff states that she was denied a pay increase and denied a transfer to another department because of her complaints regarding Rathbun's actions. Assuming arguendo that the Court accepts these allegations as establishing a proper prima facie showing, the burden shifts to the Defendant to offer a legitimate, non-discriminatory reason for any "adverse" employment action Plaintiff may have received. The Defendant has met that burden because it has explained that Plaintiff was not transferred to another department because there were no vacancies in that department. And, as for Plaintiff being denied a pay increase, Defendant states that Plaintiff was given a pay increase in May, 1996 but was kept on probation an extra ninety days because she had not received complete training for her job. Defendant states that at the end of the second ninety-day period, Plaintiff was given another pay increase.

Again, assuming arguendo that these

actions qualify as "adverse employment actions," once the Defendant proffered legitimate, non-discriminatory reasons, the burden then shifted back to Plaintiff to provide evidence that these reasons were pretext and that the real reason for the employment action was discriminatory. Plaintiff has not come close to meeting her burden for she has offered no evidence that the Defendant's reasons are both false and discriminatory. For this reason, her claim of retaliation is dismissed.

An appropriate order accompanies this memorandum opinion.

This the 18th day of October, 1999.

"s/Edward H. Johnstone"
Senior Judge
United States District Court

SEXUAL HARASSMENT POLICY

Baptist healthcare System prohibits sexual harassment of its employees. Conduct regarded as sexual harassment will be a basis for corrective and/or disciplinary action, including, but not limited to suspension, or termination of employment when:

Submission to such conduct is an expressed or implied condition of an individual's employment.

Employment decisions are made on the basis of an individual's submission to or rejection of such conduct.

BHS also prohibits unwelcome physical, written or spoken conduct of a sexual nature by employees, physicians, suppliers, and any other person with whom the system conducts business which interferes with an employee's work performance or creates an intimidating, hostile, abusive or offensive working environment.

If an employee believes that he or she is being subjected to sexual harassment, the employee should report such conduct to the facility. The very nature of sexual harassment often makes such conduct difficult to detect unless the employee being harassed reports such conduct to the facility.

BHS has established the following procedures for reporting sexual harassment:

1. An employee should report sexual harassment to his or her supervisor, the human resources director, department manager, chief executive officer, or any administrative vice president.
2. All complaints of sexual harassment will be

thoroughly investigated and appropriate corrective action and/or discliplinary action taken.

3. All complaints of sexual harassment will be investigated promptly and confidentially.
4. There will be no retaliation or intimidation toward any employee, who in good faith, makes a complaint of sexual harassment.
5. If an employee is dissatisfied with the investigation and corrective and/or disciplinary action taken, then the employee may pursue the grievance procedure set forth in this handbook.

MEMORANDUM

TO: BETTY TRACY

FROM: PAULA RECTOR, ART
Director Health Information

Date: September 10, 1998

Subject: Grievance Process

I have reviewed the Grievance/Suggestion Policy in regards to your request to meet with me regarding your Grievance proceeding following our meeting of August 12, 1998. In the August 12 meeting, Mr. Thomas and I indicated to you that the next step for you to complete, should you choose to utilize the grievance process, would be to document in writing your comments, issues or additional information for grieving and submit that written documentation to Mr. Kent Koster in Administration. It is also my understanding that Linda Ramsey also indicated the same directions to you on August 13 in response to your inquiry regarding what you should do to complete the next step in the grievance process. After reviewing the policy and speaking with Mr. Thomas recently, we have determined that the direction that was given to you in the August 12 meeting and subsequently by Mrs. Ramsey on August 13 still stands.

September 15, 1998

Ms. Betty Tracy
9820 Ogden Landing Road
West Paducah, Kentucky 42086

Dear Ms. Tracy:

As of September 14, 1998 your employment with Western Baptist Hospital is hereby terminated.

You have been repeatedly warned that your intimidating, threatening and coercive language and actions would not be tolerated. On August 12, 1998 you were given a three day suspension and a final warning that any further intimidating, threatening or disruptive behavior would result in termination. On September 10, 1998 during a meeting with Linda Ramsey you threatened that you were going to go after and "get" Paula Rector's job. This threat was issued after you continued to ignore instructions as to how to further process your grievance, thereby needlessly disrupting the work of yourself and others.

At a meeting on September 14, 1998 between yourself, Dick Thomas, Don Brown, Paula Rector and Linda Ramsey, you refused to admit or deny that you previously threatened to go after and get Paula Rector's job. In addition, at your request, Paula Rector and Linda Ramsey were asked to leave the meeting and you informed Don Brown and myself that you had heard stories about comments made in another area of the Hospital's operations, which had nothing to do with you, and you threatened to make this information public if you had to.

This behavior is not only disruptive, intimidating and threatening, it will not be tolerated at Western Baptist

Hospital. After a through investigation of the threatening comment you made to Linda Ramsey during your September 10, 1998 meeting with her, it has been determined that your employment with Western Baptist Hospital is terminated, effective immediately.

If you wish to file a grievance regarding your termination, you may send a grievance in writing, stating the reasons for your grievance, to Mr. Kent Koster, Vice President of Finance.

We will box up the personal items in your desk and mail them to you. Please mail your office key back to the Hospital to my attention. By separate letter, we will send you information concerning your right to continue health care coverage for a period of time and other benefit plan information.

Sincerely,

"s/Richard Thomas"

Richard Thomas
Executive Director of Human Resources

(2)

Supreme Court, U.S.
FILED
FEB 5 2001
OFFICE OF THE CLERK

No. 00-1027

IN THE

Supreme Court of the United States

BETTY G. TRACY,

Petitioner,

v.

BAPTIST HEALTH CARE SYSTEM, INC.,
d/b/a WESTERN BAPTIST HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court properly grant and the Sixth Circuit properly affirm summary judgment in favor of Western Baptist Hospital on Ms. Tracy's sexual harassment claim on the grounds that she failed to establish a *prima facie* case and Western Baptist Hospital responded promptly and adequately to her complaints?

2. Did the District Court properly grant summary judgment in favor of Western Baptist Hospital on Ms. Tracy's retaliation claim on the grounds that she did not suffer any adverse employment action and because she failed to demonstrate that any of Western Baptist Hospital's articulated legitimate non-discriminatory reasons for its actions were pretextual?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Baptist Healthcare System, Inc. d/b/a Western Baptist Hospital, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Betty Tracy's Petition for Writ of Certiorari should be denied because she fails to raise questions of importance. The decision below turns upon its own facts and will affect few others besides the parties involved. Furthermore, the Courts below properly applied the law to the undisputed facts in determining that Western Baptist Hospital was entitled to summary judgment on each of Petitioner's causes of action.

Petitioner failed to offer evidence sufficient to prove a *prima facie* case of sexual harassment, because she could not prove that the complained of conduct was severe and pervasive and that it altered the terms and conditions of her employment. Further, no *respondeat superior* liability existed because Western Baptist Hospital responded promptly and adequately to her complaints against a third party.

Petitioner's retaliation claim failed because she did not suffer any adverse employment actions. Further, even if Ms. Tracy had established an adverse employment action, she did not establish a nexus between her complaints of sexual harassment and the alleged adverse employment action. Finally, even if Ms. Tracy had successfully established a *prima facie* case of retaliation, she provided no evidence that Western Baptist Hospital's articulated legitimate non-discriminatory reasons for its actions were pretextual. In fact, Ms. Tracy does not challenge the Sixth Circuit's finding that she was unable to establish pretext.

STATEMENT OF FACTS

In her *pro se* petition, Ms. Tracy refers to numerous allegations that were not before the district court at the time it decided the summary judgment motion. Plaintiff thoroughly

discussed her allegations and her causes of action in her sworn deposition testimony and in her Response to Defendant's Motion for Summary Judgment. Nevertheless, she has portrayed as fact many allegations which appear for the first time in her Petition for Writ of Certiorari. These new allegations are unsupported by record evidence and were raised for the first time in her brief to the Sixth Circuit Court of Appeals or in her Petition for Writ of Certiorari. For example, on page 10 of her Petition for Writ of Certiorari, Petitioner alleges that

> an upper level member of [WBH] management was routinely making offensive sexual comments about patients who were utilizing the services of the Respondent, and that, specifically, Petitioner reported that it's [sic] management, in the presence of those employed within the area, and by using offensive slang language, questioned a physician concerning the smell of a patient's vagina.

She goes on to state that WBH terminated her for reporting this incident. This allegation was never raised before Ms. Tracy filed this Petition. Likewise, Ms. Tracy alleges that Mr. Rathbun, the alleged harasser, was promoted to a management position. This is simply incorrect. The record evidence clearly demonstrates that Mr. Rathbun was an outside contractor who was promptly removed from the hospital subsequent to Ms. Tracy's complaints. Furthermore, Plaintiff's termination was never a part of her lawsuit, although she relies on it to support her Petition for Writ of Certiorari.

Because of the lack of record support, because Ms. Tracy often flatly contradicts her sworn deposition testimony and because Ms. Tracy has attempted to present new allegations and evidence, Respondent denies all of Ms. Tracy's allegations as set forth in her Petitioner's Statement of Facts, except to extent that they are consistent with Respondent's Statement of Facts.

I. Statement of the Case.

Petitioner, Ms. Tracy, brought this suit in the U.S. District Court for the Western District of Kentucky against Baptist Healthcare System d/b/a Western Baptist Hospital ("WBH") on January 27, 1998, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.* She alleged that she had been subjected to a sexually hostile work environment at WBH by a third-party, an employee of a company under contract with WBH to provide services within the medical records department. (R.1, Complaint).[1] Ms. Tracy also claimed that after her allegations came to light, including her complaint to the EEOC, she was retaliated against by WBH. (R.1, Complaint).

II. Ms. Tracy's Employment With Western Baptist Hospital In 1995.

Ms. Tracy became an employee at Western Baptist Hospital ("WBH") in July of 1995. (R.19, Dep. of Tracy, p. 16). Before July, 1995, she worked for an agency known

1. Citations designated as "R." followed by a page number refer to the Record as certified to the Sixth Circuit Court of Appeals. Citations designated as "App." followed by a page number refer to the Appendix as designated in Petitioner's Petition for Writ of Certiorari.

as Temps Plus, (R.19, Dep. of Tracy p. 16). When hired by WBH, Ms. Tracy was assigned to the medical records department. (R.19, Dep. of Tracy pp. 16, 20). Med Copy, an independent company which contracted with WBH to provide services within the medical records department, had employees assigned therein. (R.19, Dep. of Tracy pp. 20, 22). The owner of Med Copy was Theresa Gurley. (R.19, Dep. of Tracy p. 21). In March of 1996, Don Rathbun was hired by Med Copy to work at Western Baptist Hospital. (R.19, Dep. of Tracy p. 25).

III. Ms. Tracy's Allegations Of Sexual Harassment.

On April 5, 1996, Ms. Tracy was working at the front desk of WBH with Mr. Rathbun. (R.19, Dep. of Tracy p. 26). As Mr. Rathbun walked by Ms. Tracy, his hand brushed her bottom. (R.19, Dep. of Tracy p. 28). Mr. Rathbun walked by Ms. Tracy again approximately three to five minutes later and grabbed her bottom. (R.19, Dep. of Tracy p. 29). Mr. Rathbun then left the area. (R.19, Dep. of Tracy p. 29). Later in the day Ms. Tracy was discussing, with a female co-worker, that she had a date that evening. Mr. Rathbun said to Ms. Tracy, "You need to cancel your date. You shouldn't go on your date." (R.19, Dep. of Tracy p. 37). Ms. Tracy then informed her female co-worker that she had considered going bowling on her date that evening. Mr. Rathbun said to Ms. Tracy, "Bowling is boring, you should give me 10 minutes. I could make you melt, and you would be mine, and 10 minutes would be all it would take." (R.19, Dep. of Tracy p. 38). Ms. Tracy ignored the comment and Mr. Rathbun walked away. (R.19, Dep. of Tracy p. 40).

Although WBH's sexual harassment policy provides that employees with complaints of sexual harassment should

report such harassment to their supervisor or the human resources department (R. 34, Def.'s Motion for Sum. Judgment, Ex. 2), Ms. Tracy did not report any of Mr. Rathbun's conduct to any of her supervisors that day. Later that evening, from home, Ms. Tracy called Ms. Gurley, the owner of Med Copy, and informed her of Mr. Rathbun's conduct. (R.19, Dep. of Tracy p. 42 and 43). Ms. Gurley apologized to Ms. Tracy. Another co-worker, who overheard the conversation, offered to talk to Mr. Rathbun on Ms. Tracy's and Ms. Gurley's behalf. (R.19, Dep. of Tracy p. 43). Ms. Gurley was not a WBH employee, and the co-worker was not a WBH supervisor. (R. 34, Def.'s Mot. For Sum. Judgment, Affidavit of Ms. Curtis). Ms. Gurley asked Ms. Tracy not to tell Linda Ramsey, Tracy's supervisor in the department, about the incidents of the day. Ms. Tracy agreed. (R.19, Dep. of Tracy p. 43). The co-worker talked to Mr. Rathbun the following Monday, April 8. (R.19, Dep. of Tracy p. 45). Ms. Tracy did not report the incidents to either of her supervisors that day, (R.19, Dep. of Tracy p. 48), or for some time thereafter.

On April 22, Mr. Rathbun had a confrontation with other employees while at work. (R.19, Dep. of Tracy p. 53). In the course of investigating this confrontation, Meri Curtis, the director of the WBH Medical Records Department, discovered Ms. Tracy's complaints concerning Mr. Rathbun. Ms. Curtis asked Ms. Tracy to submit a written account of her complaints. (R.19, Dep. of Tracy p. 54). Ms. Tracy provided documentation to Ms. Curtis on April 23, 1996. (R.19, Dep. of Tracy p. 55, R. 34, Def.'s Mot. for Sum. Judgment, Ex. 1). This was the first time Ms. Tracy's complaints regarding Mr. Rathbun were brought to the attention of any of her supervisors or anyone in WBH management.

IV. Western Baptist Hospital's Response to Ms. Tracy's Complaints.

In response to Tracy's complaints received on April 23, 1996, Meri Curtis spoke with WBH's Executive Director, Human Resources, Dick Thomas. As a result of that meeting, Ms. Curtis informed Ms. Gurley that Mr. Rathbun's conduct would not be tolerated, instructed Ms. Gurley to inform Mr. Rathbun of such and told Ms. Gurley that the occurrence of any further incidents would cause WBH to ban Mr. Rathbun from its premises and potentially sever its contract with Med Copy. (R. 34, Def.'s Mot. for Sum. Judgment, Affidavit of Curtis).

After April 5, Mr. Rathbun never engaged in any touching or sexual commentary with Tracy. (R.19, Dep. of Tracy pp. 49, 64). Tracy alleges, however, that between April 6 and mid-May, Mr. Rathbun breathed on her, used her phone rather than the one he was assigned to, and reached over her shoulder. Tracy alleges that these incidents, not contained in her April 23, 1996, written account, happened three to five times between April 6 and mid-to-late May. (R.19, Dep. of Tracy p. 49). On May 30, 1996, Tracy went to Don Brown, Assistant Director of Human Resources and reported that Mr. Rathbun was using her phone, breathing heavy and had reached over her shoulder. (R.19, Dep. of Tracy p. 59). On May 31, 1996, Dick Thomas, Executive Director of Human Resources arranged a meeting with Tracy wherein she stated the same complaints. (R.19, Dep. of Tracy p. 63).

On May 31, after meeting with Mr. Thomas, and in response to Ms. Tracy's May 30, 1996 complaints regarding Mr. Rathbun, Ms. Curtis called Ms. Gurley and informed her that Mr. Rathbun was banned from hospital premises.

Hospital security was also informed that Mr. Rathbun was not allowed on WBH's premises unless he was a patient or he was visiting a patient. (R. 34, Def.'s Mot. for Sum. Judgment, Affidavits of Curtis and Thomas, R.1; Dep. of Tracy p. 67). Tracy had no further involvement with Mr. Rathbun after May 31, 1996. (R.19, Dep. of Tracy p. 67).

V. Ms. Tracy's Allegations of Retaliation.

Ms. Tracy's Complaint additionally alleged that WBH retaliated against her for complaining of the alleged sexual harassment. (R.1, Complaint ¶ 11).

1. Ms. Tracy Alleges That She Was Called A "Troublemaker."

Ms. Tracy alleges that WBH retaliated against her when, on May 31, Ms. Tracy's supervisor, Linda Ramsey, called Ms. Tracy into her office and allegedly told her "to shut up about Don and quit causing trouble, because we don't need a troublemaker in the office." (R.19, Dep. of Tracy p. 72). Ms. Tracy was called into Ms. Ramsey's office because she had been discussing Mr. Rathbun and her situation with all of her co-workers. She was repeatedly recounting the incident, telling her co-workers that she was going to make the hospital pay and disrupting the ability of her co-workers and supervisors to do their jobs. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Several of Ms. Tracy's co-workers complained that they were not able to work because she was such a disruptive influence. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). The co-workers, who complained to Ms. Ramsey told Ms. Ramsey that Ms. Tracy was a troublemaker.

When discussing the complaints of her co-workers with Ms. Tracy, Ms. Gurley informed her that she should not discuss personal issues with her co-workers. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Ms. Tracy was told that the situation was a private one, it was not the business of other hospital employees, and personal issues should not be discussed during work time. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Furthermore, Ms. Tracy was attempting to spend, literally, hours each day with both her supervisor, Ms. Ramsey, and the Department Director, Ms. Curtis, discussing how the hospital was going to reconcile her complaints and compensate her for the alleged harassment. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey).

2. Ms. Tracy Alleges Retaliation Because She Was Denied Vacation Day.

Ms. Tracy alleged that WBH further retaliated by denying her request for a vacation day when her father was going to have back surgery. (R.19, Dep. of Tracy p. 69). Ms. Tracy alleges that in May, 1997, approximately one year after her complaints, she requested the day off, one week in advance, and Ms. Curtis denied her request. (R.19, Dep. of Tracy pp. 69-70).

3. Ms. Tracy Alleges Retaliation By Virtue Of A Sign In The Flower Bed.

Ms. Tracy alleged that WBH retaliated against her by putting a homemade posterboard sign in the flower bed by the smoking area. The sign read "Betties Bloomers planted here keep your butts out". (R.19, Dep. of Tracy p. 85). Ms. Tracy became upset and notified security that she was

again being harassed. The gardener, however, admitted that he had written and placed the sign in the garden to protect the flowers growing in the garden, called "Blooming Betties." The garden was next to the smoking area and employees constantly threw their cigarette butts in the flower garden. He, therefore, erected a clever sign in the hopes of discouraging the smokers from ruining the flowers. The gardener had no knowledge of Ms. Tracy. (R.34, Def.'s Mot. for Sum. Judgment, Ex.4, Statement of Clarence Thomas, gardener, security report and Affidavit of Thomas).

4. Ms. Tracy Alleges Retaliation For Using A Plain White Piece Of Paper for Write-Up.

Ms. Tracy alleged that WBH retaliated against her when, in June 1996, she left a voice mail for Linda Ramsey that she was leaving the hospital premises for lunch. Ms. Ramsey informed Ms. Tracy that her leave was unauthorized and began to document the incident in a "write-up." Ms. Tracy alleges that the write-up was retaliatory because Ms. Ramsey used a "plain white piece of paper instead of the formal corrective action form." (R.19, Dep. of Tracy p. 93). In fact, the "plain, white piece of paper" was not a reprimand, but Ms. Ramsey was simply taking notes of their conversation. When Ms. Tracy protested, Ms. Ramsey threw the notes away. Ms. Tracy was not reprimanded for leaving the hospital premises without permission. She was simply reminded of hospital policy. There was no discipline or reprimand. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey).

5. Ms. Tracy Alleges Retaliation Because She Was Denied A Pay Increase.

Finally, Ms. Tracy alleges that she was retaliated against because she was denied a pay increase after she complained of sexual harassment. (R.19, Dep. of Tracy pp. 107-108). Ms. Tracy was promoted on April 28, 1996, to a data entry position, five days after she submitted written documentation of her complaints. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 4; R.19, Dep. of Tracy p. 108). She assumed that position and received the raise associated with that position in May 1996.

As with any new position in the hospital, Ms. Tracy was on a ninety-day probationary period, at the end of which she was to receive either an additional pay raise, or to be continued on probation if all of the requirements of the new position had not been met. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Thomas). Ms. Tracy did not meet all the requirements of the new position by the end of the ninety days. She was not exposed to all facets of her new position because of her numerous absences during the initial ninety day period. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Nor had Ms. Tracy learned to combine medical records, one of the largest requirements of her position. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 7, evaluation). However, at the end of her second ninety day period, Ms. Tracy was removed from probationary status and awarded a post-probationary increase of twenty-two cents. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 8). As stated in her evaluation at the end of her second ninety days, "Betty has been trained in the remainder of her tasks." (R.34, Def.'s Mot. for Sum. Judgment, Ex. 9, evaluation). She continued to receive periodic raises over the remainder of her employment with WBH. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey).

6. Additional Allegations of Retaliation.

Ms. Tracy's additional allegations of retaliation include:

- On June 21, 1996, Ms. Tracy complains of Mr. Rathbun being in the hospital parking lot for twenty minutes while he dropped off and picked up an individual. He never entered the hospital premises and never spoke with Ms. Tracy. (R.19, Dep. of Tracy p. 103).

- Don Brown and Ms. Curtis suggested to Plaintiff that she access the Employee Assistance Program ("EAP"), which she did. (R.19, Dep. of Tracy p. 102). Later, Ms. Tracy claimed that it was retaliation that she could not have more EAP visits, so WBH allowed her unlimited visits to the EAP at the hospital's expense. (R.19, Dep. of Tracy pp. 106-107, Affidavit of Brown).

- Paula Rector allegedly told Ms. Tracy that she was not the "office spokesperson", a comment that Ms. Tracy contends is offensive (R.19, Dep. of Tracy p. 117).

- Ms. Tracy parked her car in an unauthorized parking lot and was told by security that if she parked it there again it would be towed. (R.19, Dep. of Tracy p. 186). A woman working in the Pediatric Group building, who did not know Ms. Tracy, called security and told them an unauthorized car was parked in the lot. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 5, Statement of Wilma Sheppard, security report and Thomas' affidavit). Security investigated and

discovered it was Ms. Tracy's car. They called her to have her move the car. Ms. Tracy moved her car and the hospital never towed it. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Thomas).

- Ms. Tracy alleges that she was denied a transfer to a position at the Prime Care Center, an off-premises location. (R.19, Dep. of Tracy p. 144). No jobs were available at the time, no job was posted and Ms. Tracy never expressed an interest in any particular position. She only discovered that a prior position existed at the off-premises location when her mother took the position. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Thomas).

- Ms. Tracy alleges that her pastor, with whom she had been counseling, singled her out during a church service and stated that "Christians don't sue". When asked if she held Western Baptist Hospital responsible for her pastor's actions, Ms. Tracy stated "Yes, I do. Yes, I do".(R.19, Dep. of Tracy p. 186).

In January 1998 Ms. Tracy filed a lawsuit against WBH claiming sexual harassment and retaliation. On July 29, 1999, Ms. Tracy's attorney withdrew from the case and Ms. Tracy proceeded *pro se*. WBH moved for summary judgment on July 30, 1999.

On October 18, 1999 the District Court entered its Memorandum Opinion and Order (R. 42) granting WBH's Motion for Summary Judgment, and dismissed the action with prejudice. Ms. Tracy appealed the District Court's

Opinion and Order to the Sixth Circuit Court of Appeals. On September 26, 2000, the Sixth Circuit Court of Appeals affirmed the District Court's grant of Summary Judgment.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS ARE NOT IMPORTANT

The Petition for Writ of Certiorari should be denied because the questions are not novel, her claims involve well-settled law and turn only on the specific facts of her case. Petitioner presents five questions, which essentially ask whether she proved her sexually hostile work environment claim and her retaliation claim. There is no conflict among the circuits regarding the elements of sexual harassment and retaliation under Title VII. With regard to Petitioner's hostile work environment claims, the courts below applied the elements and standards recently elucidated by the Supreme Court. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). The courts below analyzed the Title VII retaliation claim in accordance with the burden-shifting analysis espoused in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

The decision below turns upon its own facts. There is no dispute as to the relevant law or standards applied to Ms. Tracy's claims. The questions of alleged importance

involve whether Petitioner has sufficiently alleged an actionable hostile work environment and retaliation claim. These questions will affect few individuals, other than the litigants, and are not appropriate for granting certiorari. The Supreme Court has denied petitions for writ of certiorari in other cases involving similar legal and factual issues. *See Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir.) (finding conduct not sufficiently severe or pervasive so as to establish a hostile work environment claim), *cert. denied*, 522 U.S. 865, 118 S. Ct. 172, 139 L. Ed. 2d 114 (1997). Petitioner has presented no important questions for the Court to consider, and the Petition should be denied.

II.

THE SIXTH CIRCUIT'S HOLDING IS REASONABLE AND APPROPRIATE.

A. Plaintiff Failed To Offer Facts Necessary to Establish A *Prima Facie* Case Of Sexual Harassment Based On A Theory Of Hostile Work Environment

The Sixth Circuit's decision in *Tracy v. WBH* is completely consistent with the Supreme Court's decisions in *Burlington Industries, supra*, and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); as well as the Sixth Circuit decisions in *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997), *Blankenship v. Parke Care Centers*, 123 F.3d 868 (6th Cir. 1997), and *Burnett v. Tyco Corp.*, 203 F.3d 980 (6th Cir. 2000). Ms. Tracy's allegations do not satisfy the requirement of severe and pervasive conduct. Notwithstanding the severity of her allegations, WBH responded promptly and adequately to her complaints.

In total, Ms. Tracy's allegations of sexual harassment state that Mr. Rathbun, an employee of a vendor of the hospital, on one day subjected her to unwanted sexual harassment by twice touching her bottom and uttering one mild comment consisting of innuendo. (R.1, Complaint ¶ 6). As the Sixth Circuit properly held, even taking all of Ms. Tracy's allegations in the light most favorable to her, she has not established a *prima facie* case of sexual harassment based upon a hostile work environment. Ms. Tracy has failed to prove that the alleged harassment was so severe and pervasive that it affected the terms and conditions of her employment, or the existence of *respondeat superior* liability. Both are essential to a legally sufficient claim of sexual harassment. As the Sixth Circuit stated:

> Although Rathbun's conduct was offensive, Tracy failed to demonstrate the existence of a genuine issue of material fact as to whether Rathbun's alleged actions were sufficiently severe or pervasive as to create an objectively hostile work environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993); *Burnett v. Tyco Corp.*, 203 F.3d 980, 984-85 (6th Cir. 2000). The determination of whether the challenged conduct was "sufficiently severe" depends on it's frequency, whether it posed a physical or humiliatory threat, and whether it reasonably interfered with the plaintiff's work performance. *Harris*, 510 U.S. at 23. These are the elements that Tracy failed to show. Furthermore, when Tracy notified WBH of Rathbun's objectionable conduct, WBH took immediate and appropriate corrective action. *See Fenton*, 174 F.3d at 831.

(App. 1-C).

The Sixth Circuit Court of Appeals properly found that the alleged actions of Mr. Rathbun did not rise to the level of actionable sexual harassment because both the comment and the touching were isolated incidents occurring in the span of a few hours on one day. Furthermore, neither was ever repeated. Looking at the totality of the circumstances, Mr. Rathbun's actions did not constitute a legally actionable hostile work environment. His actions were not so severe and pervasive as to substantially alter Ms. Tracy's work environment. As such, Ms. Tracy did not establish a *prima facie* case of hostile work environment as stated by the Sixth Circuit in *Black v. Zaring Homes*, 104 F.3d 822 (6th Cir. 1997) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986)).

Additionally, the Sixth Circuit Court of Appeals properly determined that WBH responded promptly and adequately to Tracy's allegations of sexual harassment. (App. 1-C). In order for Tracy to prove a *prima facie* case of co-worker sexual harassment, she had to prove the existence of *respondeat superior* liability. Because WBH responded to Ms. Tracy's complaint with prompt corrective action it is not liable for alleged harassment by Ms. Tracy's co-workers.

> [W]hen an employer responds to charges of co-worker sexual harassment, the employer can be liable *only if* its response manifests *indifference* or *unreasonableness* in light of the facts the employer knew or should have known.
>
> * * *
>
> Once an employer is aware of and responds to charges of sexual harassment, though, *mere negligence as to*

> *the content of the response cannot be enough to make the employer liable.*
>
> * * *
>
> When an employer implements a remedy, it can be liable for sex discrimination in violation of Title VII *only if* that remedy exhibits *such indifference as to indicate an attitude of permissiveness* that amounts to discrimination.

Blankenship v. Parke Care Centers, 123 F.3d 868, 873 (6th Cir. 1997) (Emphasis supplied).

Ms. Tracy did not demonstrate *respondeat superior* liability, as correctly determined by the Sixth Circuit Court of Appeals. WBH became aware of Ms. Tracy's allegations only through its own investigation into another matter, and *not* because Ms. Tracy independently reported the alleged actions. After discovering Ms. Tracy's complaints regarding Mr. Rathbun, WBH elicited a statement from Ms. Tracy detailing them. After receiving her statement, WBH responded by contacting Mr. Rathbun's employer, Med Copy, and expressed its demand that the complained of conduct cease, under threat of removal from the premises and contract termination. After receiving her second complaint, wherein she admitted that there had been no further touching or inappropriate comments, WBH nevertheless banned Mr. Rathbun from the facility. This prompt and appropriate remedial action did not demonstrate any indifference by WBH. Quite to the contrary, the evidence, as admitted by Ms. Tracy, demonstrated a rapid and aggressive response to all of Plaintiff's complaints. It cannot be said that WBH's

instruction and removal of Mr. Rathbun "exhibit[ed] such indifference as to indicate an attitude of permissiveness." *Blankenship*, *supra* at 873.

Ms. Tracy did not satisfy the *respondeat superior* element of proving a *prima facie* case of co-worker sexual harassment. The District Court properly dismissed her claim and the Sixth Circuit Court of Appeals properly affirmed the dismissal.

B. Summary Judgment Was Appropriate As To Plaintiff's Retaliation Claim Because She Failed To Offer Facts Sufficient To Establish A *Prima Facie* Case And, Alternatively, Failed To Offer Facts That The Articulated Reasons For the Complained-Of Actions Were Pretextual

The Sixth Circuit Court of Appeals properly affirmed the dismissal of Ms. Tracy's claim of retaliation based on the fact that Ms. Tracy could not establish that she suffered an adverse employment action, and even had she done so, she offered no evidence that WBH's legitimate non-discriminatory reasons for its actions were pretextual. (App. 1-C, 1-D).

Virtually all, if not all, of the actions complained of by Ms. Tracy fail to rise to the level of an adverse employment action. Specifically, the following complained of actions simply are *not* material changes in terms and conditions of employment, *Rabinovitz v. Penna*, 89 F.3d 482, 488 (7th Cir. 1996), but rather are merely trivial employment actions: (1) allegedly being told to "quit causing trouble because we don't need a troublemaker in the office"; (2) denial of her request for a vacation day; (3) the sign

in the flower bed; (4) the alleged write-up when Ms. Tracy left the premises without speaking to her supervisor; (5) Mr. Rathbun's presence in the hospital parking lot for 20 minutes one day; (6) the suggestion that she access the EAP program; (7) being told she was "not the office spokesperson"; and, (8) being told if she again parked in an unauthorized lot she would be towed. Ms. Tracy's complaint that her pastor stated that "Christians don't sue", is not an employment action at all. As the Sixth Circuit Court of Appeals correctly stated, none of the actions alleged by Tracy altered the "compensation, terms, conditions or privileges" of her employment.

Ms. Tracy also alleges that she was retaliated against when she was promoted to a new position, given a pay increase, but then denied an additional pay increase at the end of her initial ninety-day probationary period. She was continued on probation for an additional ninety days and at the end of the second period, she was given her pay increase. The Sixth Circuit properly found that this was not a retaliatory action. (App. D-1).

It is illogical to infer that WBH gave Ms. Tracy a promotion, with a twenty-five cent an hour increase, so that they could delay her twenty-two cent an hour increase, which she received at the end of her probationary period, in order to "retaliate" against her.

However, assuming *arguendo*, that those two occurrences constituted "adverse employment actions", the Sixth Circuit Court of Appeals properly found that WBH articulated legitimate non-discriminatory reasons for both

actions, and Tracy presented no evidence, other than her own conclusory statements, that WBH's articulated reasons were pretextual. As the Sixth Circuit stated:

> Tracy failed to establish a prima facie case of retaliation, as none of the alleged acts of retaliation involved an adverse employment action. The only actions that could possibly be construed as adverse are the denial of a transfer and initial post-probation pay increase. However, even if Tracy could establish a prima facie case of retaliation, WBH had legitimate, non-discriminatory reasons for denying her request for a transfer and initial post-probation pay increase and Tracy has not provided evidence from which a reasonable jury could conclude that WBH's proffered reasons were a pretext for discrimination. See *Burdine*, 450 S. at 253; McDonnell Douglas, 411 U.S. at 804.

(App. D-1).

For the above-stated reasons' the Sixth Circuit Court of Appeals properly dismissed Ms. Tracy's retaliation claim.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

BETTY G. TRACY, PETITIONER

V.

BAPTIST HEALTHCARE SYSTEM, INC.,
doing business as WESTERN BAPTIST HOSPITAL, INC.,

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit and
The United States District Court,
Western District Of Kentucky, Paducah Division

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

I. THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION, IS IN CONFLICT WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES. THE IMPROPER DECISION WAS UPHELD BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

In Memorandum Opinion of the District Court, all reasonable inferences were found to be in favor of the Petitioner, yet ruling was in favor of the Respondent.

This decision is in conflict with a decision of the United States Supreme Court, having ruled in the case of Reeves v. Sanderson Plumbing Products, Inc. (U.S., No. 99-356, 06/12/00:) in that:

> "...in deciding Rule 50 motion for judgment as matter of law, court should, as in deciding motion for summary judgment, review all evidence in record, draw all reasonable inferences in favor of the nonmoving party, and disregard all evidence favorable to the nonmoving party that a jury is not required to believe."

The District Court as well as The United States Court of Appeals each erred in ruling that there is no genuine issue as to any material fact; that Tracy failed to demonstrate Rathbun's actions as severe or pervasive in creation of the objectively hostile work environment; and, that Tracy did not suffer any adverse actions by the employer. Furthermore, the District Court erred in this matter in ruling that Rathbun's actions were not frequent or so severe as to unreasonably interfere with the Plaintiff's job performance.

In fact, the actions of Rathbun did unreasonably interfere with the Petitioner's work performance in that:

A. On numerous occasions of Rathbun's harassment, Tracy had to leave the work area in order to bring to a stop the sexually overt, hostile and intimidating conduct that she endured from Rathbun, thereby not only slowing Tracy in her productivity, but also creating a working environment of fear, upset and dread of Rathbun's continual offensiveness.

B. On numerous occasions Rathbun called for the attention of Tracy and numerous coworkers in order to have them witness his mashing his acne sores then wiping the acne contents on a specific coworker.

C. Rathbun instigated a workplace altercation which required intervention of numerous staff members, including Tracy, as well as security personnel. This altercation and the employer's investigation caused more than two weeks of department wide discord and lowered productivity. Additionally, just as with the numerous complaints to management by various sources of Rathbun's other offensive actions, the Respondent did not issue any warnings or reprimandations to Rathbun, and he was thereby allowed to bring further discord into the workplace (concerning that he assaulted the husband of his girlfriend, who also happened to be his immediate supervisor) and resulted in numerous staff members, including Tracy, being subpoenaed to an emergency legal proceeding.

D. Tracy's physician's ordered her off from work on numerous occasions as a direct result of the work place environment, and one of these occasions

Tracy's physician ordered her to be hospitalized in the emotional wellness unit of another hospital.

This matter, with it's documented details, does indeed present that there is absolute genuine issue of numerous material facts. The Respondent's management documented in Tracy's employment record, on a consistent basis, their intent and methods of retaliating against her, based upon her complaints of sexual harassment. To prove the existence of genuine issue as to material fact, Tracy seeks to present:

A. The employment file that Baptist Healthcare System, Inc., d/b/a Western Baptist Hospital kept on Tracy, since this file is in excess of eight hundred pages for Tracy's three year tenure of employment at Western Baptist Hospital. The Respondent's management even included their intentions to retaliate against Tracy on a consistent basis.

B. Documentation in which:

1. The Respondent's management claims to have "...advised (Tracy) not to honor the subpoena." in which her testimony would have been unfavorable to Rathbun.

2. The Respondent acknowledged two prior complaints had been made by Tracy concerning the sexually offensive and intimidating actions of Rathbun. Respondent also admits, in the same documentation, that they did not even attempt to issue any form of prompt corrective action toward Rathbun concerning either of Tracy's prior complaints.

3. After Tracy reported that she had endured one of the incidents of workplace sexual harassment, the Respondent's management advised her that "That happened three days ago.", and "I don't think that I can do anything about it." The documentation of this matter further proves that the Respondent's management counseled Tracy for this complaint by using a "scenario", in that "...if you have a puppy and it pees in the floor, you don't wait three days to rub it's nose in it."

Tracy seeks jury trial in this matter in order to have the terms of "pervasive" and "severe" properly defined.

Tracy seeks witness testimony in this matter since other's also complained to Baptist Healthcare's management of being sexually harassed by Rathbun. Furthermore, the Respondent's management approached numerous coworkers of Tracy and expressed intent to retaliate against Tracy for complaining of sexual harassment.

II. THE RESPONDENT HAS CONSISTENTLY FAILED TO ADDRESS NUMEROUS SIGNIFICANT FACTS OF THIS MATTER AS CONTAINED WITHIN THE PETITIONER'S COMPLAINT.

The Respondent has never addressed numerous significant issues of this matter, including that Rathbun made threatening remarks to Tracy. During one of these occasions Rathbun threatened Tracy not to make him or his family mad, (complaint, p.3. e.). This threat was issued by Rathbun after he boasted that his "uncle" Charles Rathbun, a California photographer, was the subject of national media attention for having murdered a model by the name of Linda Sobek. (Appellant's Brief, p.6; Pet. for Writ of

Cert., p. 6). This threat, as well as numerous others, were witnessed by numerous others also employed within the area, and Respondent's management had received several complaints, yet failed to take any form of corrective action.

The Respondent has failed to address that it's management told Tracy in regards to her complaints of Rathbun's actions that "It was all in your head." (Complaint, p. 4, h.). Furthermore, the Respondent has also failed to address that Tracy was told that she could avoid being given a reprimand only if she gave the department management a copy of a tape she that had made of this conversation. (Complaint, p. 4, l.)

Throughout this matter the Respondent has failed to address that they required the Petitioner to use personal time to access their requirement that Tracy access the Employment Assistant Program. (Complaint, p. 5, n.)

Furthermore, the Respondent has never address that their management advised Tracy not to honor a subpoena she received in a legal proceeding in which her testimony would have been damaging to Rathbun.

III. BAPTIST HEALTHCARE SYSTEM, INC., d/b/a WESTERN BAPTIST HOSPITAL RESPONDS TO NUMEROUS FACTS OF THIS MATTER BY ERRONEOUSLY DEFENDING IT'S ACTIONS.

Respondent states in it's Brief for Opposition that after receiving complaints on April 23, 1996, of Rathbun's sexually offensive actions that it's management spoke with Rathbun's immediate management and warned that if there were any further incidents that Rathbun would be banned from the premises. (Brief in Opposition, p. 6). The Petitioner hereby points to the following:

1. For the Respondent's management to contact the supervisor of the harasser does not constitute any form of reprimandation as is the policy of the Petitioner.

2. Respondent's claim of having spoken with Rathbun's supervisor concerning the complaints of his actions cannot be taken in good faith since the Respondent did not issue any proper documentation of this erroneous corrective action.

3. Respondent's claim of threatening to ban Rathbun from the premises is erroneous, since Rathbun did return to the premises on numerous occasions.

Respondent, contrary to fact, claims that Tracy told co-workers that she was going to "make the hospital pay", and disrupting co-workers and supervisors. (Brief in Opposition, p. 7). Petitioner never said that she was going to make the hospital pay, but in fact, on a repeated basis asked that the hospital: A) take appropriate action to stop the sexually offensive actions, and B) stop retaliating against her for having complained of Rathbun's actions. The Respondent is unable to provide any of co-workers as witnesses to say that they reported Tracy to management in Respondent's erroneous claim that Tracy was being disruptive to her co-worker's for discussing Rathbun and that she was going to "make the hospital pay". Respondent's denial of calling Tracy a "troublemaker" is erroneous. That the Respondent's admission of this having called Tracy into the office constitutes discrimination, in that the Respondent does admit that their management called Tracy into the office and instructed her to stop discussing the actions Rathbun, yet Rathbun was allowed to continue with the sexually harassing conduct. Furthermore, Tracy had not discussed Rathbun's actions with her co-workers, but instead, only moments before

had made a further complaint to another member of management of Rathbun breathing on her. Immediately after making this further complaint, Tracy was indeed called into the department supervisor's office and told "We want you to just shut up about Don and quit causing trouble. We don't need a troublemaker in this office."

Tracy was denied a pay increase and placed on a ninety-day probation. The Respondent's management informed Tracy that this decision was based upon "personal problems". Petitioner merely claims that Tracy had not been exposed to all facets of her job position, "due to her numerous absences during the initial ninety-day period." Tracy respectfully directs to this pretextual reasoning of the Respondent by offering the following:

1) Petitioner requested that she be granted training in the area of combining duplicate medical records. For more than one year, Tracy requested of the department management that she receive training in this area, which is crucial to patient care. The Petitioner, more than one and one half years after being assigned this responsibility, was only granted the training that she requested after having made this request to the hospital's personnel department. (Resp. to Mot. for Sum. Judg., attach. k., 06/18/97).

2) The Respondent has failed to acknowledge that the Petitioner's absences were:

(A) Tracy was removed from work by her physician for a one week period, not only for having endured Rathbun's actions, but also as a direct result of the treatment that she received from the hospital in their repeated resistance against Tracy for having complained.

(B) Tracy was required to by the Respondent to

attend the Employment Assistance Program, and included within this requirement of the Respondent, Tracy was also required to use her vacation time to do so.

IV. CONCLUSION

The Respondent's explanations of the facts of this matter are only mere pretextual explanations, as well as mere denials, and thereby received improper judgment by the District Court as well as at the Sixth Circuit. Your Petitioner, Betty G. Tracy, hereby respectfully prays that this matter be remanded back to the District Court level with jury trial and witness testimony in order to have a proper decision granted.

Respectfully Submitted,

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